

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:21-cv-253-RJC-DCK

SEAN FITZGERALD MSCALL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	<u>ORDER</u>
)	
UNITED STATES DEPARTMENT OF)	
TREASURY, et al.,)	
)	
Defendants.)	
)	

THIS MATTER comes before the Court on the Court's July 29, 2021 Order, (Doc. No. 7), Plaintiff Gerald T. Mescall's Motion for Preliminary Injunctive Relief and Temporary Restraining Order, (Doc. No. 8), both Plaintiffs' Amended Applications to Proceed Without Prepayment of Fees and Affidavits, (Doc. Nos. 11, 14, 16), and Plaintiff Sean F. Mescall's "Ex Parte Motion to Appoint United States Marshals to Serve Summon and Complaint...", (Doc. No. 17).

This action was filed by *pro se* Plaintiffs Sean Mescall ("Sean"), who is incarcerated, and Gerald Mescall ("Gerald"), who is not. Sean filed an Application to proceed *in forma pauperis* and the Court has ordered his prisoner trust account statement so that it may determine whether Sean's Application should be granted. See (Doc. Nos. 2, 4).

Gerald did not initially file an Application and, on June 3, 2021, the Court issued a Notice of Deficiency requiring him to pay the filing fee or file an Application within 14 days. (Doc. No. 3). On June 14, 2021, Gerald filed an Application but it was incomplete and the Court was unable to determine whether it should be granted. (Doc. No. 5). On July 29, 2021, the Court denied Gerald's Application without prejudice to pay the filing fee or file a complete Amended

Application (Long Form) within 14 days. (Doc. No. 7). The Court cautioned Gerald that failure to comply with the Order would result in dismissal of this action is to him without prejudice and without further notice. (Doc. No. 7 at 2).

Gerald filed his Amended Application on September 2, 2021, 21 days late. The Amended Application is also deficient in that it is not on the Long Form as instructed by the Court. Therefore, Gerald's Amended Application will be denied and this action will be dismissed without prejudice as to Gerald for lack of prosecution. Fed. R. Civ. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."); Link v. Wabash R.R. Co., 370 U.S. 626, 631-33 (1962) (although Rule 41(b) does not expressly provide for *sua sponte* dismissal, a district court has the inherent power to dismiss a case for lack of prosecution or violation of a court order). Gerald's Motion for Preliminary Injunctive Relief and Temporary Restraining Order, (Doc. No. 8), will be denied as moot.

Sean has also filed Amended Applications, however, his original Application is still under consideration pending receipt of his prisoner trust account statement. Therefore, Sean's Amended Applications, (Doc. Nos. 11, 16), will be denied as moot.

In his "Motion to Appoint...," Sean asks the Court to appoint the U.S. Marshals Service to serve the summons and Complaint pursuant to Rule 4 of the Federal Rules of Civil Procedure. (Doc. No. 17). The Motion will be denied. The Complaint has not yet been screened for frivolity pursuant to 19 U.S.C. § 1915(e), so service is premature. The Court will order service at the appropriate time should the Complaint pass initial review; no Motion is necessary.

IT IS, THEREFORE, ORDERED that:

1. Plaintiff Gerald. T. Mescall's Amended Application to Proceed Without Prepayment

of Fees and Affidavit, (Doc. No. 14), is **DENIED**.

2. Plaintiff Gerald. T. Mescall is **DISMISSED** from this action without prejudice for failure to comply with the Court's July 29, 2021 Order.
3. Plaintiff Gerald T. Mescall's Motion for Preliminary Injunctive Relief and Temporary Restraining Order, (Doc. No. 8), is **DENIED** as moot.
4. Plaintiff Sean Fitzgerald Mescall's Amended Applications to Proceed Without Prepayment of Fees and Affidavit, (Doc. Nos. 11, 16), are **DENIED** as moot.
5. Plaintiff Sean Fitzgerald Mescall's "Ex Parte Motion to Appoint United States Marshals to Serve Summon and Complaint...", (Doc. No. 17), is **DENIED**.

Signed: September 14, 2021

Robert J. Conrad Jr.
Robert J. Conrad, Jr.
United States District Judge

